No. 12879

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES MONROE JEFFERSON,

Appellant,

vs.

STOCKHOLDERS PUBLISHING CO., INC., a Nevada corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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A.

Statement of the Pleadings and Facts Disclosing Jurisdiction.

Appellant is a resident of California and appellee is a Nevada corporation. The matter in controversy exceeds the sum of $3000 [R. 3]. The action is predicated on an alleged libel in a newspaper, and the District Court has jurisdiction because of the diversity of citizenship and the amount in controversy as provided in 28 U. S. C. 1332. A final order of dismissal was entered [R. 14] and this court has jurisdiction of an appeal therefrom as provided in 28 U. S. C. 1291.

B.
Statement of the Case.

Appellant filed his complaint in the District Court of the Southern District of California asking $100,000 damages because of a libel published in the "Daily News," a newspaper owned and published by appellee [R. 3 to 9]. The complaint was filed January 12, 1950 [R. 9]. A summons was not issued at that time as a bond was not filed [R. 19].

Thereafter, on August 22, 1950, an undertaking on suit for libel in the amount of $500 was filed and summons issued [R. 19]. The summons was served and it was then filed in court August 30, 1950 [R. 12].

A motion to dismiss was filed on September 13, 1950 [R. 19]. An amended motion to dismiss was thereafter filed on September 28, 1950 [R. 13], which amended motion was granted and the action ordered dismissed [R. 15] on the ground that appellant failed to comply with Rule 4(a) F. R. C. P. in that the complaint was filed on the 12th day of January, 1950, and the summons was not issued until the 22nd day of August, 1950, over seven months' later [R. 15]. Rule 4(a) provides as follows:

> "4(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants."

The trial court concluded that because of such delay in issuance of summons, the action should be dismissed under Rule 41(b) F. R. C. P. [R. 15]. Rule 41(b) provides that a defendant may move for dismissal for failure of the plaintiff to comply with the rules.

As disclosed on the clerk's docket entries, summons was not issued when the complaint was filed because a bond was not then on file [R. 19]. The bond was filed August 22, 1950, and the summons was issued forthwith on the same day as shown in the docket entries [R. 19].

The federal court has jurisdiction only because of diversity of citizenship, as the action is for libel under the law of California and that law governs as to the rights of the parties. One of the rights accorded the defendant in a libel action is that a bond shall be furnished by plaintiff before summons can be issued by the clerk (Act 4317 General Laws of California, p. 1532). Section 1 of that act is as follows:

> §1. Undertaking. In an action for libel or slander the clerk shall, before issuing the summons therein, require a written undertaking on the part of the plaintiff in the sum of five hundred (500) dollars, with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action be dismissed or the defendant recover judgment, that they will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action, or on an appeal, not exceeding the sum specified in the undertaking. An action brought without filing the undertaking required shall be dismissed."

After providing for justification of sureties, exceptions, new bonds, etc., the same act provides in Section 7 as follows:

> "§7. Costs. In case plaintiff recovers judgment, he shall be allowed as costs one hundred (100) dollars, to cover counsel fees, in addition to the other costs. In case the action is dismissed, or the defendant recover judgment, he shall be allowed one hundred (100) dollars, to cover counsel fees, in addition to the other costs, and judgment therefor shall be entered accordingly."

It will be noted that Section 1 does not require the filing of the bond before the filing of the complaint or concurrently therewith, but is addressed only to the issuance of the summons. The California Code of Civil Procedure provides an action is commenced with the filing of the complaint as follows:

> "§ 350. When an action is commenced. An action is commenced, within the meaning of this title, when the complaint is filed. (Enacted 1872.)"

That California Code also provides that the filing of the complaint is the commencement of the action as follows:

> "§ 405. (Actions, how commenced.) Civil actions in the courts of this state are commenced by filing a complaint. (Enacted 1872; Am. Code Amdts. 1873-74, p. 296.)"

Under the California law summons can be issued at any time within one year after the complaint is filed as provided in the Code of Civil Procedure as follows:

> "§ 406. (Indorsement of complaint: Summons, issuance and service.) The clerk, or, if there be no clerk, the justice, must indorse on the complaint the

day, month and year that it is filed, and at any time within one year thereafter the plaintiff may have a summons issued, * * *"

The questions involved on this appeal all grow out of a determination whether the requirement of F. R. C. P. that a summons be issued "forthwith" after the filing of the complaint is mandatory, and means immediate, as against the California law that the summons may be issued any time within one year after the filing of a complaint and the requirement of the California law that the summons cannot be issued in a libel action until a bond is filed for the protection of the defendant.

C.
Specification of Errors.

Appellant relies upon the following specification of errors:

1. The court erred in finding that the appellant failed to comply with Rule 4(a) of F. R. C. P. in the delay in the issuance of summons.

2. The court erred in refusing to recognize the provision of the state law that summons may be issued within one year after the complaint is filed when it recognized that the summons cannot be issued until an undertaking was filed as required by state law and that the appellee was entitled to a judgment for attorney's fees as provided in said state law.

3. The court erred in determining that the action should be dismissed because of the failure to have summons issued at the time of the filing of the complaint.

4. The court erred in finding that the court has no jurisdiction over the appellee, it having been served with summons and having appeared in the action.

D.
ARGUMENT.

Summary.

The federal rule that the clerk shall issue a summons "forthwith" on the filing of the complaint is not so rigid and inflexible as to prevent the application of state law in diversity of citizenship cases where conditions and privileges are established which affect the issuance of the summons.

The state law which requires the filing of a bond before the issuance of summons in a libel action is to be given effect by the federal court in a diversity of citizenship case. A state law which gives the plaintiff the privilege of filing such bond and having summons issued at any time within one year is also to be given effect by the federal court.

Diversity of citizenship cases are to be so conducted in federal courts that the results will be the same as if the case were in the state courts, in so far as legal rules affect the outcome.

Federal Rules.

Rule 4(a) F. R. C. P. provides that upon the filing of the complaint the "clerk" shall "forthwith" issue a summons. The duty and responsibility is placed on the clerk. No specific time requirement is fixed but only a duty which should be performed when the complaint has been filed and nothing is to be done except the clerk's actual issuance of the document itself.

The same section then provides that "upon request of the plaintiff" separate or additional summons shall issue. This sentence makes clear that there is no time limitation as such, but that a summons may be issued at a later

time when conditions warrant. In such a case, the clerk has no duty to issue the summons until the plaintiff requests it.

In neither sentence, read separately or together, is there any suggestion of a time deadline and that the failure of the clerk to actually issue the summons within a certain specified time would make it impossible for him to do so at a later date.

It was error for the district court to rule that the requirement that summons be issued forthwith is so rigid and inflexible that it cannot be varied, in a diversity of citizenship case, by a right or privilege granted by the state law.

California Law.

The California law does not put the responsibility on the clerk, but leaves it to the plaintiff to have summons issued and gives him one year within which to do so (Code of Civ. Proc., Sec. 406).

The state law also requires, in a libel suit such as the one now before the court, that the summons may not be issued until a bond has been filed for the protection of the defendant. Again the responsibility is on the plaintiff.

Since the plaintiff has the responsibility, the California law recognizes that there must be a time limit within which he may have the summons issued, and it fixed that period as one year after the filing of the complaint (Code of Civ. Proc., Sec. 406). This gives plaintiff one year within which to file the bond in a libel action.

The period of limitation for the commencement of actions in California (Code of Civ. Proc., Sec. 335) for libel is one year (Code of Civ. Proc., Sec. 340(3)). An

action is commenced when the complaint is filed (Code of Civ. Proc., Sec. 350).

The plaintiff thus has one year in which to file his complaint and an additional year within which he can make arrangements for and file his bond and have summons issued. The effect of the one year within which to file the bond is an extension of the statute of limitations for the purpose of the bond.

It was error for the district court to hold that the privileges, granted to the plaintiff by the state law, are all lost to him when he is in the federal court.

Diversity of Citizenship Case.

This case is in federal court only because of the diversity of citizenship of the parties. All rights are established by the state law. In the determination of the rights of the parties in the federal court, it is not necessary to conclude whether any particular point involves a substantive right or a procedural right, for the U. S. Supreme Court has established a very definite rule that "in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of litigation in the federal courts should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court." This quotation is from the case of

Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079.

See also:

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188;

Regan v. Merchants Transfer Co., 69 S. Ct. 1233, 337 U. S. 530, 48 Mich. L. Rev. 531;

Isaacks v. Jeffers, 144 F. 2d 26, Cert. Den. 323 U. S. 781, 89 L. Ed. 624, 65 S. Ct. 270.

Plaintiff Should Have Privileges as Well as Responsibilities Created by State Law.

In the case now before the court, the state law was applied as to the liabilities placed on plaintiff. The clerk would not issue summons because of the plaintiff's failure to file the bond and only did so after the bond was filed [R. 19]. The judgment recognizes the correctness of the clerk's action for the defendant is awarded $100 attorney's fees by virtue of the same state law which required the filing of the bond.

The court, however, refused to recognize the privilege, granted by the state law, of one year within which the plaintiff could file the bond after the filing of the complaint. Because the bond was not filed immediately and the clerk did not issue the summons "forthwith" the plaintiff was thrown out of court. This was without any recourse or opportunity for a day in court for the statute of limitations had run.

This outcome is the direct result of a strict construction and application of legal rules, is not on the merits, and is not the same result that would have been the outcome in the state court. It is directly contrary to the rule and policy established by the Supreme Court.

Furthermore, if it were possible to estop a court in the conduct of its affairs, the court's action in this case should bring about such a result. When the district court required the plaintiff to file a bond before summons would be issued, and when it gave defendant judgment for attorney's fees under the authority of the law which required the bond, that court should be estopped from denying him one year within which to file the bond as allowed under the state law.

The district court erred when it determined that the action should be dismissed because the summons was not issued at the time the complaint was filed. This result could only be brought about by a strict application of a legal rule of procedure and is one that cannot be justified in any manner under the state law.

The District Court Had Jurisdiction of Appellee.

Summons was issued and served on the appellee who made a general appearance in the action. There was no motion to quash the summons or the service. Appellee could have appeared without summons. Having appeared, it is too late for it to take advantage of the technicality as to the time when the summons was issued.

The court erred in ruling that it had no jurisdiction over appellee.

Conclusion.

Appellee should not be denied his day in court by a strict application of a federal rule which results in denying him privileges granted by the state law. This is particularly so when, as in this case, the alleged noncompliance with the federal rule was brought about by the federal court demanding compliance with a liability created by the state law. The judgment should be reversed.

Respectfully submitted,

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